A

UNITED OVERSEAS BANK (MALAYSIA) BHD v. LEE YAW LIN & ANOR

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
HAMID SULTAN ABU BACKER JCA
B NALLINI PATHMANATHAN JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-2114-12-2014]
11 FEBRUARY 2016

TORT: *Negligence – Liability clause – Exclusion of – Bank's agreement for hire*
C *of safety box – Efficacy of exclusion clause – Whether exclusion clause comprised part of contract governing legal relationship between parties – Whether customer bound by contract – Whether lawful for bank to limit its liability*

The respondents ('the plaintiffs') were granted judgment against the appellant bank ('the bank') arising from the theft of their valuables, which had been
D stored in a safe deposit box on the bank's premises. The plaintiffs, in the claim for fraud and/or negligence against the bank, alleged that the break-in of the safety box was an 'inside job'. The bank maintained that it was not liable for the losses as it owed no duty of care to the plaintiffs for any loss or damage to the contents of the safety deposit box arising directly or
E indirectly, *inter alia*, from the negligence of its employees, burglary, robbery or any cause beyond its control. The exempted instances were set out in cl. 13 of the safety deposit box rental agreement entered into between the parties. The trial judge held that the relevant exclusion or limitation of liability clauses, contained in cls. 13 and 14 were ineffective to absolve the bank from liability for negligence because an earlier agreement executed by
F the plaintiffs did not contain the exclusion or limitation of liability clauses. The clauses were only inserted in the later and current agreement and the fact that the plaintiffs did not place their initials next to cls. 13 and 14 of the 2002 agreement meant that the clauses had not been brought to their notice. The trial judge also rejected the testimony of the bank's employee ('SD2') that she
G had brought cls. 13 and 14 to the notice of the plaintiffs when the 2002 agreement was executed on the grounds that, as a long time employee of the bank, her evidence should be treated with caution. Hence, this appeal. The primary issue on appeal in relation to liability was the efficacy of the exclusion clause and the limitation of liability clause in the bank's rental
H agreement with the plaintiffs for the hire of a safety box.

Held (allowing appeal)
Per Nallini Pathmanathan JCA delivering the judgment of the court:

(1) The words in cl. 13 of the 2002 agreement were crystal clear and
I delineate the situations in which the bank sought to exempt liability. The issue of liability on the part of the bank was inextricably intertwined with the effect of the exclusion of liability clause found in cl. 13. The clause expressly negates all responsibility and liability on the

part of the bank to the plaintiffs for loss and damage to the contents of the safety deposit box, which was caused, directly or by a series of acts, omissions or events as stipulated. It was clear that liability by reason of negligence on the part of the employees of the bank was excluded, as was burglary and robbery with or without violence. The final limb was widely cast to exempt the bank from liability for any cause beyond the control of the bank. This clause comprised a part of the contract governing the legal relationship between the parties. (paras 17, 18 & 32)

(2) Clauses 13 and 14 were expressly set out in the 2002 agreement. The plaintiffs executed the 2002 contract in its entirety, thereby accepting that cls. 13 and 14 comprised a part of the contract of hire for the safety deposit box and were bound by the clauses. The plaintiffs were assumed to have understood and agreed to all the terms in the hire contract. Having signed the contract in its entirety, the plaintiff could not contend that the specific clauses were not enforceable. Further, the fact that they chose not to read the contract in its entirety did not mean that they were not bound by the terms of the contract. (paras 25, 26 & 31)

(3) SD2 testified that the insertion of the new clauses had been explained to the customers when they were asked to sign the new agreement and believed that the customers understood the new clauses. The rejection of SD2's evidence by the trial judge on the basis that SD2 was a long time employee of the bank and was therefore not a neutral and independent witness, was not tenable. Just because an employee had a long history of employment with his employer, it does not mean that it can be inferred that the employee will be less than credible in his testimony about the practices of the employer. (paras 28 & 29)

(4) The primary function of a bank is the transaction of banking business, not acting as a custodian or as a bailor for the good of its customers. The provision of safety deposit boxes is ancillary to the primary function of the bank. To that extent, the bank affords its customers a degree of privacy to store its valuables in exchange for a very modest sum of money. The consideration levied in no way matches or is equivalent to the value of the contents of the safety box, as the bank had no knowledge of the contents of each safety box. Given the nature of the bargain between the parties, where valuables are stored for a relatively modest sum, it was not untenable or unlawful for the bank to seek to limit its liability. (para 37)

Bahasa Malaysia *Headnotes*

Responden-responden ('plaintif-plaintif') diberikan penghakiman terhadap perayu bank ('bank') berbangkit daripada kecurian barang-barang berharga yang disimpan oleh mereka dalam peti simpanan selamat di premis bank tersebut. Plaintif-plaintif dalam tuntutan untuk penipuan dan/atau kecuaian terhadap bank tersebut mendakwa bahawa pecah masuk peti keselamatan itu

merupakan 'kerja orang dalam'. Bank menegaskan bahawa ia tidak bertanggungjawab ke atas kerugian kerana ia tidak mempunyai kewajipan berhati-hati kepada plaintif-plaintif bagi apa-apa kerugian atau kerosakan kepada kandungan peti simpanan selamat yang berbangkit secara langsung atau tidak langsung, antara lain, daripada kecuaian kakitangannya, kecurian, rompakan atau apa-apa sebab di luar kawalannya. Perkara yang dikecualikan termaktub dalam kl. 13 perjanjian sewaan peti simpanan selamat yang dimeterai antara pihak-pihak terlibat. Hakim bicara memutuskan bahawa pengecualian atau had klausa-klausa liabiliti relevan yang terkandung dalam kl. 13 dan 14 tidak berkesan untuk membebaskan bank daripada liabiliti bagi kecuaian kerana perjanjian terdahulu yang dimeterai oleh plaintif-plaintif tidak mengandungi pengecualian atau had klausa-klausa liabiliti. Klausa-klausa tersebut hanya dimasukkan dalam perjanjian terkemudian dan terkini dan fakta bahawa plaintif-plaintif tidak meletakkan singkatan mereka bersebelahan dengan kl. 13 dan 14 dalam perjanjian 2002 bermakna klausa-klausa itu tidak dibawa kepada perhatian mereka. Hakim bicara menolak keterangan pekerja bank ('SD2') bahawa dia membangkitkan kl. 13 dan 14 kepada pengetahuan plaintif-plaintif apabila perjanjian 2002 dimeterai dengan alasan bahawa, sebagai pekerja lama bank, keterangannya wajar dipertimbangkan dengan berhati-hati. Oleh itu, rayuan ini. Isu utama rayuan berhubung dengan liabiliti adalah keberkesanan klausa pengecualian dan had klausa liabiliti dalam perjanjian sewa bank dengan plaintif-plaintif bagi sewaan peti keselamatan.

Diputuskan (membenarkan rayuan)
Oleh Nallini Pathmanathan HMR menyampaikan penghakiman mahkamah:

(1) Perkataan dalam kl. 13 perjanjian 2002 adalah jelas dan menggambarkan situasi di mana bank cuba mengecualikan liabiliti. Isu liabiliti oleh pihak bank bertaut rapat dengan kesan pengecualian klausa liabiliti dalam kl. 13. Klausa dengan nyata menafikan segala tanggungjawab dan liabiliti bank kepada plaintif-plaintif bagi kehilangan dan kerosakan kepada kandungan peti simpanan selamat yang disebabkan, secara terus atau oleh satu siri tindakan, pengecualian atau kejadian seperti yang ditetapkan. Jelas bahawa liabiliti disebabkan kecuaian kakitangan bank dikecualikan seperti kecurian dan rompakan dengan atau tanpa keganasan. Cabang akhir bersifat meluas bagi mengecualikan bank daripada liabiliti terhadap apa-apa sebab di luar kawalan bank. Klausa ini termasuk sebahagian daripada kontrak yang mengawal hubungan undang-undang antara pihak-pihak.

(2) Klausa 13 dan 14 dengan nyata termaktub dalam perjanjian 2002. Plaintif-plaintif memeterai kontrak 2002 secara keseluruhan, dengan itu menerima bahawa kl. 13 dan 14 meliputi sebahagian kontrak sewa bagi peti simpanan selamat dan terikat dengan klausa-klausa. Plaintif-plaintif dianggap memahami dan bersetuju dengan semua terma dalam kontrak

sewa. Setelah menandatangani kontrak secara keseluruhan, plaintif-plaintif tidak boleh menyangkal klausa-klausa spesifik tersebut tidak boleh dikuatkuasakan. Lantarannya, fakta bahawa mereka memilih untuk tidak membaca kontrak sepenuhnya tidak bermakna bahawa mereka tidak terikat dengan terma-terma kontrak.

(3) SD2 memberi keterangan bahawa kemasukan klausa-klausa baru dijelaskan kepada pelanggan-pelanggan apabila mereka diminta untuk menandatangani perjanjian baru dan percaya pelanggan-pelanggan memahami klausa-klausa baru tersebut. Penolakan keterangan SD2 oleh hakim bicara atas dasar bahawa SD2 pekerja lama bank dan yakni bukan saksi neutral dan bebas, tidak terpakai. Hanya kerana seseorang pekerja bekerja bagi tempoh yang lama dengan majikannya, tidak bermakna ia boleh disimpulkan bahawa keterangan pekerja tentang amalan majikannya tidak boleh dipercayai.

(4) Fungsi utama bank adalah transaksi urusan perbankan, bukan bertindak sebagai penjaga atau penjamin kesejahteraan pelanggan-pelanggannya. Peruntukan peti simpanan selamat adalah bersampingan dengan fungsi utama bank. Setakat itu, bank menyediakan pelanggan-pelanggannya tahap privasi untuk menyimpan barang-barang berharga bagi pertukaran untuk jumlah wang yang sangat sederhana. Nilai balasan yang dikenakan sama sekali tidak sepadan atau bersamaan dengan nilai kandungan peti keselamatan kerana bank tidak mengetahui kandungan setiap peti keselamatan. Memandangkan sifat urusan antara pihak-pihak di mana barang-barang berharga disimpan dengan kadar bayaran yang agak sederhana, tidak dapat dipertahankan atau tidak sah untuk menyatakan bahawa bank tidak berhak mengehadkan liabilitinya.

Case(s) referred to:

Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd [1983] 2 AC 803 ***(refd)***
Chai Then Song v. Malayan United Finance Bhd [1993] 2 CLJ 640 HC ***(refd)***
L'Estrange v. F Graucob Limited [1934] 2 KB 394 ***(refd)***
Olley v. Marlborough Court Ltd [1949] 1 All ER 127 ***(dist)***
Photo Production Ltd v. Securicor Transport Ltd [1980] 1 All ER 556 ***(refd)***
Polygram Records Sdn Bhd v. Hillary Ang & 4 Ors (Collectively Known As "The Search") & Anor [1994] 3 CLJ 806 HC ***(refd)***
Saunders v. Anglia Building Society [1970] 3 All ER 961 ***(refd)***
UMW Industries [1985] Sdn Bhd v. Kamaruddin Abdullah & Anor [1989] 2 CLJ 1278; [1989] 2 CLJ (Rep) 619 HC ***(refd)***

For the appellant - Yoong Sin Min (Ng Hooi Huang with him); M/s Shook Lin & Bok
For the respondents - Viswanathan Mahendran; M/s Mahendran & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22 NCVC-617-12-2013 (overruled).]

Reported by S Barathi

A

JUDGMENT

Nallini Pathmanathan JCA:

Introduction

B **[1]** This appeal arose from a judgment of the High Court in Kuala Lumpur where the plaintiffs (the respondents here) were granted judgment against the defendant bank (the appellant here) arising from the theft of their valuables, which had been stored in a safe deposit box on the defendant bank's premises. For ease of convenience, the respondents will be referred to as the 'plaintiffs'. The appellant, United Overseas Bank, who was the C defendant, will be referred to as the 'bank'.

[2] The plaintiffs are husband and wife and were joint hirers of a safe deposit box with one of the bank's branches at Medan Pasar. For this service, they paid a sum of RM400 a year. In October 2012, it appears that a person unknown to the bank, had broken into the vault where the safe deposit boxes D were placed, and burglarised some of the boxes, including that of the plaintiffs.

[3] The plaintiffs instituted this claim against the bank in fraud and/or negligence, claiming loss and damages in the sum of RM1,480,514 together with aggravated/exemplary damages, interest and costs.

E **[4]** They alleged that the break-in of the safety deposit box was an 'inside job'. They maintained that the bank had been negligent.

[5] The bank maintained that it was not liable for the losses as it owed no duty of care to the plaintiffs for any loss or damage to the contents of the safety deposit box arising directly or indirectly, *inter alia* from the negligence F of its employees, burglary, robbery, or any cause beyond its control. The rest of the exempted instances are set out in cl. 13 of the safety deposit box rental agreement entered into between the parties.

[6] The learned judge determined that the relevant exclusion or limitation of liability clauses were ineffective to absolve the bank from liability for G negligence, because an earlier agreement executed by the plaintiffs did not contain the exclusion or limitation of liability clauses. These clauses were only inserted in the later and current agreement executed by the plaintiffs and the bank. The learned judge was of the view that the onus remained on the bank to establish that these exemption and exclusion of liability clauses were H brought to the notice of the plaintiffs.

[7] Ancillary to this, the learned judge also rejected the testimony of the bank's employee that she had brought cls. 13 and 14 to the notice of the plaintiffs when the 2002 agreement was executed, on the grounds that as a long time employee of the bank, her evidence should be treated with caution. I Finally, the learned judge concluded that the fact that the plaintiffs did not place their initials next to cls. 13 and 14 of the 2002 agreement, meant that these clauses had not been brought to their notice.

Court Of Appeal

[8] The primary issue on appeal in relation to liability, was the efficacy of the exclusion clause and the limitation of liability clause in the bank's rental agreement with the plaintiffs for the hire of a safety deposit box. Having heard learned counsel and having perused the appeal records we concluded unanimously that the appeal should be allowed. In short, we gave effect to the exclusion of liability clause.

[9] We set out below the reasons for our conclusion.

Preliminary Issue Relating To The Scope Of The Appeal

[10] Prior to the hearing of the appeal, the plaintiffs raised a preliminary objection relating to the scope of the appeal. This is because the bank, in its notice of appeal, stipulated that the appeal was only against a part of the decision of the High Court. This did not, on the face of it, appear to encompass the finding of liability in negligence against the bank.

[11] However, the bank's memorandum of appeal states clearly that the appeal is against the whole of the decision of the High Court decision, thereby encompassing the finding of liability in negligence too.

[12] In light of the plaintiffs' preliminary objection, the bank filed a motion to amend the notice and memorandum of appeal to better reflect its intention, namely that the appeal was against the entirety of the decision, save for that part of decision that found that there was no fraud on the part of the bank.

[13] We heard and allowed the notice of motion before hearing the appeal on its merits.

Salient Background Facts

[14] The following facts are not in dispute:

(a) by way of an agreement dated 16 June 1998 ('the 1998 agreement'), the bank agreed to let and the plaintiffs agreed to hire safe deposit box No. 260 in the bank's Medan Pasar Kuala Lumpur branch ('box 260');

(b) since then, the plaintiffs have used box 260 to store various valuables and important documents;

(c) *vide* an agreement dated 15 January 2002 ('the 2002 agreement'), the same arrangement was continued. However, among the differences between the two agreements is that the 2002 agreement contained an exclusion clause (cl. 13) and a limitation clause (cl. 14);

(d) on 19 October 2012, a Friday, at about 11.30am, the vault where the safety deposit boxes were placed was broken into. This was in the basement of the bank. The bank maintained that it was by a person

unknown to the bank. The bank tried to contact the plaintiffs the following day but failed to do so. They were only able to communicate with the plaintiffs on 23 October 2012 when a meeting was fixed for 25 October 2012;

(e) the first plaintiff duly inspected box 260 and found that it was not damaged. All the valuables in it were gone, but documents such as copies of title deeds remained in it. The first plaintiff was asked to furnish the particulars of articles kept in box 260 within seven days after confirming the contents;

(f) the bank maintained that it would process the plaintiffs' written claim in accordance with cl. 14 of the 2002 agreement. This required that a written claim had to be made to the bank with a statutory declaration, proof of loss and a police report lodged by the plaintiffs. It was also pointed out that liability was limited in accordance with cl. 14 of the 2002 agreement;

(g) the plaintiffs did not provide a statutory declaration or proof of loss. However, the plaintiffs did make a claim with an inventory for the valuables they had lost which they estimated at RM1,480,514;

(h) the plaintiffs' solicitors furnished the bank with a list of the valuables together with their valuation on 9 November 2012; and

(i) however, the bank refused to pay the amount claimed by the plaintiffs, after which the plaintiffs filed this claim.

The High Court Judgment

Liability

[15] The High Court, after a full trial, concluded that the plaintiffs had proved their claim in negligence against the bank, on a balance of probabilities. The learned judge, in so concluding, undertook a comprehensive consideration of the circumstances and evidence relating to the loss of the valuables from box 260. These findings are fully and extensively discussed in the learned judge's grounds of judgment, and we do not propose to reproduce these findings here.

[16] They are largely findings of fact and this court, sitting in its appellate capacity, would be loath to interfere with such findings, save and unless the findings were such as to warrant the clear inference that the judge was plainly wrong in her appreciation of the evidence, culminating in a miscarriage of justice. As such, although we may not agree with the entirety of the findings arrived at by the learned trial judge in relation to negligence, this in itself is insufficient to warrant interference on our part.

[17] However, the matter does not end there. The issue of liability on the part of the bank is inextricably intertwined with the effect of the exclusion of liability clause found in cl. 13 of the 2002 agreement between the plaintiffs and the bank for the hire of box 260. It provides as follows:

> 13. The Bank shall not be responsible to the Customer nor be liable in any way for any loss or damage to the contents of the Box arising directly or indirectly from:
>
> (i) the Customer loss of Keys; or
>
> (ii) acts of persons impersonating the Customer or its authorised persons; or
>
> (iii) acts of other customers of the Bank or persons whilst at the Bank premise; or
>
> (iv) negligence of the Bank employees, servants or agents; or
>
> (v) natural calamity, acts of God, flood or lightning; or
>
> (vi) fire or explosion; or
>
> (vii) burglary, robbery with or without violence, armed or otherwise; or
>
> (viii) war, riot, sabotage, civil commotions or confiscation or nationalisation or requisition or destruction of, or damage to property by or under the order of any government or public authority; or
>
> (ix) any cause beyond the control of the Bank, its employees, servants or agents.

[18] The clause expressly negates all responsibility and liability on the part of the bank to the plaintiffs for loss and damage to the contents of box 260, which is caused, directly or by a series of acts, omissions or events as stipulated. It is clear that liability by reason of negligence on the part of the employees of the bank is excluded, as is burglary and robbery with or without violence. The final limb is widely cast so as to exempt the bank from liability for any cause beyond the control of the bank. This clause comprises a part of the contract governing the legal relationship between the parties.

Exemption Clauses

[19] In the leading case of *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556, the House of Lords held that parties to a contract are free to determine what primary obligations they will accept (see Lord Diplock at p. 566 c-d). Notwithstanding this, parties may agree to an exclusion clause that excludes or modifies such obligation (see Lord Diplock at p. 567 f-g). In other words, exclusion or exemption clauses, particularly where the words are crystal clear, ought to be given their full effect. Ultimately, this will be a question of construction of the exemption clause in the context of the contract as a whole.

[20] The approach to be adopted in undertaking such construction has been ably laid down in the House of Lords' case of *Ailsa Craig Fishing Co Ltd v. Malvern Fishing Co Ltd* [1983] 2 AC 803 where Lord Wilberforce explained it thus:

> … Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole. If it is to exclude liability for negligence it must be most clearly and unambiguously expressed, and in such a contract as this, must be construed *contra proferentem*. … one must not strive to create ambiguities by strained construction, as I think the appellants have striven to do The relevant words must be given, if possible their natural, plain meaning.

[21] He went on to explain that limitation clauses are not viewed with as much hostility as exemption or exclusion of liability clauses.

[22] It is clear from the reasoning of the learned trial judge that Her Ladyship concurs with the foregoing approach and application of the law in relation to exemption and exclusion clauses. Her reasons for rejecting these clauses was quite different, namely that that the effect of these clauses had not been made expressly known to the plaintiffs. The issue before us is whether her conclusion is defensible in fact and in law.

The Findings Of The High Court In Relation To The Applicability Of The Exclusion Clause

[23] Specifically, the learned trial judge held that both the exclusion clause (cl. 13) and the limitation clause (cl. 14) do not apply to the factual matrix of this case to absolve the bank of liability nor limit its liability. She concluded that they were inapplicable because they were not contained in the first agreement signed between the parties in 1998. These exclusion and limitation of liability clauses were only subsequently entered in 2002. Relying on the case of *Olley v. Marlborough Court Ltd* [1949] 1 All ER 127 the learned judge held that in order to be effective, the exclusion clause had to be incorporated into the contract at the time when it was made.

[24] The foregoing case is distinguishable from the facts of our case. In *Olley v. Marlborough Court Ltd* (above), the defendant hotel owner sought to rely on a limitation of liability clause whereby the hotel would not be responsible for stolen articles unless handed to the manageress for safe custody. However, the notice of such clause was not brought to the attention of the plaintiff's guest in that case. It was held in those circumstances that the defendant could not rely on the limitation clause to absolve itself from liability, as the clause had not been incorporated into the contract between the parties as the guest had not seen it until after she had been accepted as a guest in the hotel.

[25] By contrast in our case, the plaintiffs executed a contract for the hire of box 260 on specific terms and conditions. The entirety of the terms and conditions of such hire are set out including cls. 13 and 14. The plaintiffs executed the 2002 contract in its entirety, thereby accepting that cls. 13 and 14 comprise a part of the contract of hire for the safety deposit box.

[26] The plaintiffs are assumed to have understood and agreed to all the terms in the hire contract. (see *L'Estrange v. F Graucob Limited* [1934] 2 KB 394; *Polygram Records Sdn Bhd v Hillary Ang & 4 Ors (Collectively Known As "The Search") & Anor* [1994] 3 CLJ 806; [1994] 3 MLJ 127.) It is untenable to conclude that despite having signed the contract in its entirety, the plaintiffs can now contend that the specific clauses are not enforceable. The learned trial judge's reliance on this case to support an alleged lack of notice is, in our view, unsustainable.

[27] The learned trial judge also accepted that the general rule was subject to a qualification that an exclusion clause may be effectively incorporated into the contract by a subsequent variation of its terms, but this remained a matter of construction to be viewed against the special facts of the particular case. The inclusion of this last qualification, namely that any variation to the terms is a matter of construction to be viewed against the special facts of a particular case, does not reflect the general position in law. Instead it appears to seek to exclude the instant case from the general application of the law.

[28] We are also of the view that the learned trial judge erred in rejecting outright the evidence of SD2, one Puan Ramnah, a witness for the bank. SD2 testified that the employees of the bank had explained the insertion of the new clauses to customers when asking them to sign the new agreement in 2002. SD2 stated under cross that she believed the customer understood the new clauses of the new safety deposit box agreement. However, the learned trial judge chose to reject this evidence on the grounds that SD2 was a long time employee of the bank and therefore "… is not a neutral and independent witness and her evidence should be received with caution".

[29] The basis for the rejection of SD2's evidence is not tenable. Just because an employee has a long history of employment with his employer, does not mean that it can be inferred that the employee will be less than credible in his testimony about the practices of the employer. The rejection of SD2's evidence on those grounds is, with respect, erroneous.

[30] Even if the wrongful rejection of SD2's evidence is ignored, it appeared to us that the learned judge erred in concluding that the exclusion cl. 13 was inapplicable because it had not been brought to the notice of the plaintiffs. The evidence showed to the contrary.

[31] Clauses 13 (and 14 on limitation of liability) are expressly set out in the 2002 agreement. The plaintiffs signed the 2002 agreement in its entirety, meaning that they are bound by cls. 13 and 14. The fact that they chose not

to read the contract in its entirety does not mean that they are not bound by the terms of the contract (see *Saunders v. Anglia Building Society* [1970] 3 All ER 961; *Chai Then Song v. Malayan United Finance Bhd* [1993] 2 CLJ 640; *UMW Industries [1985] Sdn Bhd v. Kamaruddin Abdullah & Anor* [1989] 2 CLJ 1278; [1989] 2 CLJ (Rep) 619.)

[32] The words in cl. 13 are crystal clear and delineate the situations in which the bank seeks to exempt liability.

[33] It is pertinent that the bank retained the right to make further rules and regulations in relation to the conduct of its business *vide* cl. 20 of the agreement. In other words, it reserved the right to vary the terms and conditions as necessary. Clauses 13 and 14 were therefore correctly inserted into the 2002 contract.

The Hire Of Safety Deposit Boxes

[34] The learned judge in her judgment stated that:

> 58. To allow clauses 13 and 14 to stand would be tantamount to making illusory the clear representations of safety and security offered by the banks in respect of safe deposit boxes. The public at large when applying for a safe deposit box from a bank expects and is entitled to expect that their valuables would be protected and kept safe.

[35] It appeared to us that the learned judge erred in her comprehension of the essential bargain between the bank and its customer in relation to safety deposit boxes. The primary function of a bank is the transaction of banking business, not acting as a custodian or as a bailor for the goods of its customers. The provision of safety deposit boxes is ancillary to the primary function of the bank. To that extent therefore, the bank affords its customers a degree of privacy to store its valuables in exchange for a very modest sum of money. In other words the consideration levied in no way matches or is equivalent to the value of the contents of the safety box, as the bank has no knowledge of the contents of each safety box.

[36] In these circumstances, the bank chooses to limit its liability for causes beyond its control.

[37] SD3, Yap Kok Tee for the bank explained the rationale for cls. 13 and 14. His evidence, which stood unchallenged, does not appear to have been considered in the court below. SD3 explained that in consideration of a relatively modest sum of money, customers of the bank are given the hire of safe deposit boxes. These customers have complete privacy in relation to the boxes, as the bank can never verify the contents of the same. If the banks were to effectively guarantee the safeguard of the contents of these safety boxes, the banks' liability would be unlimited. They would be acting like insurers without the sizeable premiums normally levied by insurers. Given the nature of the bargain between the parties where, as we pointed out earlier, valuables are stored for a relatively modest sum, it is not untenable or

unlawful for the bank to seek to limit its liability. To that extent, the banks limit their liability in the event of burglary, theft or events beyond their control. In so far as customers such as the plaintiffs are concerned, it is open to them to take out insurance against such risk. (see *Photo Production Ltd v. Securicor Transport Ltd* [1980] 1 All ER 556.)

Conclusion

[38] In conclusion, we were convinced that the learned trial judge erred in holding that the exclusion clause and the limitation of liability clause were inapplicable. The evidence showed that the plaintiffs executed the 2002 agreement, which clearly excludes liability in all the instances under cl. 13. Therefore, the bank is not liable for the losses suffered by the plaintiffs.

[39] In all these circumstances, we were satisfied that this was a fit and proper case for appellate intervention. Accordingly, the appeal was allowed. The decision of the High Court was set aside and the plaintiffs' claim dismissed.

[40] Finally, we granted the appellant costs of RM40,000 for the proceedings here and below. The deposit was refunded to the appellant.